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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1052

NORMA MOONEY, *Petitioner*

v.

STAINLESS, INC., et al, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on July 13, 1964.

CITATIONS TO OPINIONS BELOW

The initial opinion of the Court of Appeals and the court's opinion denying rehearing are reported at 338 F.2d 127 (6th Cir. 1964). They are reproduced herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1964. Petitioner thereafter filed a timely petition for rehearing, which was denied on November 12, 1964. Mr. Justice Stewart entered an order on February 3, 1965 granting petitioner's motion for extension of time within which to file a petition for certiorari to and including April 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the determination by the Court of Appeals that there was not sufficient evidence to submit to the jury petitioner's theory that respondent was negligent in hiring an incompetent independent contractor deprived petitioner of her constitutional right to a jury trial of the evidentiary facts, where the trial court had determined that there was such sufficient evidence and where the jury found, by way of general verdict, that the respondent was in fact negligent; and whether the Court of Appeals erred in failing to apply Tennessee law on the question of what constituted "sufficient evidence," in contravention of the rule of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64.

2. Whether the Court of Appeals erred in reversing the trial-court-approved general verdict, substituting its opinion for the verdict of the jury on the question of whether an employer-employee relationship existed between respondent and its subcontractor when, assuming the establishment of the existence of such relationship, respondent would be liable to petitioner for common law damages under Tennessee law as a non-complying employer which rejected Tennessee's Workmen's Compensation Act; and whether such action deprived petitioner of her constitutional right to trial by jury.

STATUTES INVOLVED

The Tennessee and Illinois Statutes involved are printed, *infra*, as Appendix B at 16a.

STATEMENT OF THE CASE

Petitioner's husband, Harley W. Mooney, was killed after being catapulted off the top of a 150-foot steel tower, while he was assisting in the erection of such tower at Oak Ridge, Tennessee. The Atomic Energy Commission had engaged the H. K. Ferguson Company, one of the prime contractors at Oak Ridge, to furnish and erect three 150-foot steel towers. Ferguson prepared the tower bases and solicited bids from others, including one Stainless, Inc., for the fabrication and erection of the towers. (R. 99-100a; 256-57a).

Stainless, a Pennsylvania corporation, was successful in its bid for fabrication; subsequently Ferguson requested Stainless to also undertake erection of these towers. Stainless operated a subsidiary, Stainless Construction Company, which handled field details with respect to the erection of the towers designed and fabricated by Stainless, Inc. Although styled as a "construction" company, Stainless Construction Company actually was essentially a "paper" corporation, whose principal purpose was, whenever the purchaser so requested, to see to the erection of towers sold by the parent, Stainless, Inc. It generally accomplished this purpose by "subcontracting" out the actual construction work. (R. 276-77a; 300a). The two corporations were treated as one defendant in this litigation.

The initial bid of Stainless for fabrication of the towers was $4,500. After Ferguson requested erection in addition to fabrication, Stainless Construction Com-

pany obtained oral bids from two tower erectors. William Wood, doing business as Central Illinois Tower Maintenance Company, a sole proprietorship of Monticello, Illinois, proposed to do the work for $3,000, which bid he made over long-distance telephone without ever having seen any plans or details of the towers or the physical location where they were to be erected, evidently basing his bid primarily upon the information that there were three 150-foot towers to be erected at Oak Ridge, Tennessee. (R. 279a). This bid was $1,575 lower than the only other bid received. (R. 281a). Stainless then submitted a bid of $9,430 to Ferguson for fabrication and erection of the towers, which was accepted. Stainless fabricated the towers and engaged Wood to erect them for the $3,000.

Mooney was an employee of Wood and, like Wood, a resident of Illinois. Wood, Mooney, and another individual who had been working for Wood proceeded to Oak Ridge at a prearranged time, their arrival coinciding approximately with that of the fabricated towers from Stainless in Pennsylvania. (R. 204a.). Erection of two of the towers was completed without incident. However, Mooney was fatally injured during the erection of the top section of the third tower. At the time of the fatal accident, Wood was operating a pickup truck with a block and tackle arrangement attached to the rear. (R. 79a). Erection of the tower was accomplished with the aid of a "gin pole"[1] which was continually raised higher as the work progressed toward completion with the addition of each twenty-

[1] "An apparatus for hoisting heavy weights; now usually a tripod, with a winch or drum round which the rope is wound." Oxford Universal Dictionary, 793 (3rd ed.).

foot section. As one of Wood's other employees who witnessed the accident described the arrangement:

> This gin pole fastened to the top of the tower and projected away on up in the air and a snatch block on the top of this gin pole with the bull line, [rope] we call it, back down to the ground, and the other end of the bull line came down the tower and through a snatch block at the base of the tower and then the bull line went through a snatch block there at the base out 100 feet, or something like that, to a pine tree sitting on a bank, and a snatch block at the base of that tree, and then the bull line went to a pickup truck which was headed down a very, very steep hill . . . imbedded with coarse rock . . . twelve inches or deeper on this grade. . . . So they tied the end of this bull line that come through the snatch block from the gin pole to the section of the tower which they were erecting.
>
> * * *
>
> Well, they tied the bull line to the section of the tower, tied the bull line out here from the pine tree to the pickup truck which was headed down the hill . . . he [Wood] goes down this steep hill quite a ways. I don't know how many feet, but quite a little ways . . . the tower, it was going up, of course, and it got up to where it was to be connected to the part that was already erected . . . [then] these men, . . . climbed the tower and bolted it together. . . . And these men on the—he had a loudspeaker on the pickup, and he hollered to them a time or two, and they says, "all right, slack off, slack off. . . ." So he started backing up through these loose gravels. He backed up a few feet and went ahead just a little bit, then he backed up and he must have come back about eight or ten feet the second time, then he started ahead. Therefore, I don't know just what happened, but he just kept going and that tightened up the bull line to the

> steel again and the tower began to sway like this (indicating). It did that four or five times. Of course, those men were hollering bloody murder, and I was hollering the same, trying to get him to stop.
>
> Whether his foot slipped off the brake, or whether he hit the foot feed there which caused him to keep going, I couldn't say. But, anyway, the tower went just like this, and then it broke in two up quite a ways. I don't know exactly how far up in the air, how far up it was it broke, but it came to the ground, and this Mooney, he went sailing through the air just like a big crow. He just sailed through the air and landed about 150 feet away down the side of the hill. (R. 78a-82a).

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner recovered a $50,000 judgment against Stainless, Inc. for the wrongful death of her husband.[2] Petitioner maintained two alternative theories before the trial court: (1) that Wood was an employee of Stainless, and Stainless was chargeable with Wood's negligence under the doctrine of *respondeat superior;* and (2) that if Wood was an independent contractor, Stainless was negligent in hiring an incompetent tower erecter. Both theories were submitted to the jury, and a general verdict was returned in favor of petitioner. Respondent's timely motions for a directed verdict (R. 193a)

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[2] Petitioner had recovered a $35,000 jury verdict against Stainless in a previous trial. The trial judge set aside the judgment, however, on respondent's motion for a new trial for the reason that the judge felt he might have been in error in submitting to the jury, in addition to petitioner's two theories herein considered, the theory that erecting towers was an extra-hazardous activity and Stainless had a non-delegable duty to see to the safety of the workers.

and judgment not withstanding the verdict (R. 43a) and in the alternative for a new trial were denied because the trial court determined there was sufficient evidence to go to the jury on both of petitioner's theories of liability.

The Court of Appeals for the Sixth Circuit reversed the jury determination, finding that even if Wood was an employee of Stainless, the fact that Wood had complied with the Illinois Workmen's Compensation Act, and the fact that Wood's carrier had voluntarily begun payments to Mooney's widow, would bar petitioner from a common law suit in Tennessee. (App. A. at 3-4a). The court further found error in the trial court's submission to the jury of the question of the negligence of Stainless in hiring an incompetent subcontractor. (App. A at 7a).

The court denied petitioner's timely petition for rehearing, although in so doing it modified somewhat its original decision. Petitioner maintained in its petition for rehearing that the Illinois law would not shelter Stainless if it was the employer of Wood, since Stainless had failed to file certificates of Workmen's Compensation Insurance with the State of Tennessee, and therefore was amenable to a common law damage suit as an employer which had "rejected" the Tennessee Act. In response, the court stated that Stainless did not have to comply with the Tennessee Act unless it had five employees working in Tennessee, and Stainless could only have five employees in Tennessee if Wood were considered the employee of Stainless. (App. A at 12a). Although the jury had, by way of general verdict, determined the existence of such relationship, the Court of Appeals *reweighed* the evidence for itself, in effect trying the issue *de novo,* and found that "these

facts do not establish that the relationship of employer-employee existed between Stainless and Wood." (App. A at 12a). Significantly, the Court did not phrase the issue as being one of the sufficiency of the evidence to go to the jury.

With respect to her second theory, petitioner argued that the Court of Appeals erred in its determination that it was error for the trial court to submit to the jury petitioner's theory of the negligence of Stainless in engaging an incompetent contractor, for the reason that there was sufficient, material evidence that Wood did not have the proper equipment to do this job and that respondent was negligent in hiring him.

Petitioner further argued that the court had erred in sitting as a "thirteenth juror" and in deciding the issue on the "preponderance of the evidence," a function solely within the province of the jury. The court rejected petitioner's argument, maintaining that petitioner had misinterpreted its original opinion, wherein it had stated, after cataloging some of the evidence on the issue:

> In light of the above, we are of the opinion that plaintiff failed to carry her burden of proof, and there was not sufficient evidence of Wood's alleged incompetence to submit to the jury the question of whether Stainless was negligent in selecting him. (App. A. at 7a).

However, the court modified its first opinion to conform to its rehearing rationalization, *i.e.*, by striking the words "plaintiff failed to carry her burden of proof" from the sentence quoted above. (App. A. at 15a).

REASONS FOR GRANTING THE WRIT

I.

This Court has been increasingly vigilant in recent years in preserving to litigants their Seventh-Amendment-guaranteed right to a jury trial in federal cases. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres* v. *Westover,* 359 U.S. 500, 501, quoting *Dimick* v. *Schiedt,* 293 U.S. 474, 486. See also *Dairy Queen* v. *Wood,* 369 U.S. 469. The Court has described the function assigned to the jury as "an essential factor in the process for which the Federal Constitution provides." *Byrd* v. *Blue Ridge Rural Elec. Coop.,* 356 U.S. 525, 539, quoting *Herron* v. *Southern Pac. Co.,* 283 U.S. 91, 95. See also *Simler* v. *Conner,* 372 U.S. 221.

Perhaps the most outstanding manifestation of the Court's concern for preserving this right has been its frequent review of sufficiency-of-the-evidence cases under the Federal Employers' Liability Act. Cognizant of its duty to effectuate the intention of the Congress that litigants should have a right to a jury determination under the Act, this Court has been vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of such determination. *E.g., Harris* v. *Pennsylvania R. Co.,* 361 U.S. 15, 20 (citing cases); *Rogers* v. *Missouri Pac. R. Co.,* 352 U.S. 500. See generally Anno: FELA—Sufficiency of Evidence, 4 L ed 2d 1787. The Court has been equally solicitous in preserving this right to litigants under the Jones Act. *E.g., Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107; *Ferguson* v.

Moore-McCormack Lines, Inc., 352 U.S. 521, 549 (citing FELA cases).

The Court's concern for protection of the right to jury determination of factual questions under these Federal statutes has led to conjecture as to whether the same policy might also extend to personal injury cases in the Federal courts on diversity jurisdiction. *Rogers* v. *Missouri Pac. R. Co., supra* at 542 (Frankfurter, dissenting). Indeed, it would appear that, although utilizing the power sparingly, the Court has in fact reviewed sufficiency-of-the-evidence determinations of lower federal courts in non-FELA or Jones Act cases. *Phillips Petroleum Co.* v. *Gibson,* 232 F.2d 13 (5th Cir. 1956), reversed at 352 U.S. 874 (Per curiam); *Eastern Air Lines, Inc.* v. *Union Trust Co.,* 221 F.2d 62 (D.C. Cir 1955), reversed at 350 U.S. 907 (Per curiam); *Atlantic Coast Line R. Co.* v. *Swafford,* 220 F.2d 901 (5th Cir. 1955), reversed at 350 U.S. 807 (Per curiam); *Carolina Life Ins. Co.* v. *Williams,* 210 F.2d 477 (5th Cir. 1954), reversed at 348 U.S. 802 (Per curiam).

The instant case, stripped to its barest essentials, brings to this Court a forthright sufficiency-of-the-evidence question on the issue of negligence in a federal diversity personal injury action. Nonetheless it is an important case. It is important to petitioner because she has been the victim of a gross injustice, which fairly cries out to be redressed.[3] It is important to this

[3] By reason of the action of the court below in reversing the jury verdict of $50,000, petitioner has been relegated to compensation payments of $46.00 per week for a maximum of six years (so long as she does not die or remarry). She has been forced to take a job as a steel drill press operator, in order to support herself and her seven-year-old son. (R. 67a).

Court and the whole Federal court system because it might perhaps serve as a suitable vehicle for this Court to settle the question of what standard—state or Federal—is to be utilized in determining the sufficiency of the evidence to go to the jury where Federal jurisdiction is based upon diversity of citizenship. See *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437; *Mercer* v. *Theriot*, 377 U.S. 152. It is important in another respect—it arrests one's attention on the fact that yet another jury determination has been set aside by a reviewing court, thereby contributing to the subtle erosion of this constitutionally guaranteed right. This decision "marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway* v. *United States*, 319 U.S. 372, 397 (Black, dissenting). The erosion is perhaps imperceptible when viewed from the point of view of a single case; yet when assessed from the perspective of years, and hundreds of cases, it is apparent that incursions have been made into the guarantees of the Seventh Amendment, and that this Court's repeated admonishments that factual questions are for the jury have not been heeded. See, *e.g.*, *Jacob* v. *New York City*, 315 U.S. 752. This case presents the Court with a suitable opportunity to dam up this erosion and again secure to litigants their rights insured under our Constitution.

Whether a state or Federal standard determines the sufficiency of the evidence to support a jury verdict in cases in the District Courts where jurisdiction is based on diversity of citizenship is still an open question. *Mercer* v. *Theriot*, *supra* at 156. (Harlan, dissenting). See 5 Moore's Federal Practice (2d ed 1951) §38.10.

A determination by a Federal court which conflicts with applicable state law in this important area raises grave implications under the doctrine enunciated in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64. Lower Federal courts have recognized and considered this problem, but their decisions are not harmonious and lend little guidance on the question. *Hanson* v. *Ford Motor Company,* 270 F.2d 586 (8th Cir. 1960); *Lind* v. *Schenley Indus., Inc.,* 278 F.2d 79 (8th Cir. 1960); *Greene* v. *Werven,* 275 F.2d 134 (8th Cir. 1960). (Applying state standard or reserving question.) *Royal Indemnity Co.* v. *Curtis,* 256 F.2d 329 (5th Cir. 1958); *Allen* v. *Matson Navigation Co.,* 255 F.2d 273 (2d Cir. 1958); *Poague* v. *Great Atlantic & Pacific Tea Co.,* 242 F.2d 575 (5th Cir. 1957). (Applying federal standard.) Although this question may be "lurking in this case" much as it was in *Dick* v. *New York Life Ins. Co., supra* at 444, in the sense that it was not acknowledged by the court below, the question is here presented if this Court is now disposed to decide it.

Laying aside the fact that the Sixth Circuit committed grave error in this case, *the outstanding failure in its opinion is that it does not articulate precisely what standard, state or Federal, settled or novel, it is utilizing in determining the sufficiency of the evidence to go to the jury on either of petitioner's theories.* The court simply lays out some of the evidence on petitioner's theories, weighs the evidence, decides which preponderates, and then declares that, at least with respect to the second theory, there was not sufficient evidence to go to the jury. In order to properly assess the merits of this petition it is necessary to examine the applicable Tennessee law, the evidence in the case,

and the treatment of the question on review by the Court of Appeals. We look first to the question of the sufficiency of the evidence to submit to the jury petitioner's theory that respondent was negligent in hiring an incompetent subcontractor.

The standard to be applied by Tennessee courts on this question has been stated by the Tennessee Supreme Court thus:

> While these issues involve a review of the evidence, such review is not to determine where the truth lies or to find the facts, that not being our province in jury cases. It is only to determine whether there was any substantial evidence to support the verdict; and it must be governed by the rule, safeguarding the constitutional right of trial by jury, which requires us to take the strongest legitimate view of all the evidence to uphold the verdict, to assume the truth of all that tends to support it, to discard all to the contrary, and to allow all reasonable inferences to sustain the verdict. *Rose & Co.* v. *Snyder,* 185 Tenn. 499, 508, 206 S.W.2d 897, 901 (1947). See also *Mid-South Pavers, Inc.* v. *Whitaker,* 385 S.W.2d 284 (1964), *cert den.,* Jan. 6, 1965; *Arnett* v. *Fuston,* 378 S.W.2d 425 (1963), *cert. den.,* March 5, 1964; *Lowe* v. *Irvin,* 373 S.W.2d 623 (1963), *cert. den.,* June 4, 1963; *Hobbs* v. *Livesay,* 372 S.W.2d 199 (1963), *cert. den.,* July 15, 1963; *Cawthon* v. *Mayo,* 325 S.W.2d 629 (1959), *cert. den.,* June 5, 1959. (*cert. den.* refers to Tennessee Supreme Court.)

As we have said, it is impossible to tell exactly what standard the Sixth Circuit was following. It is apparent, however, that it was not applying the standard which governs this question in Tennessee State courts, even though it did not allude to the fact that it was not

applying Tennessee law. The court's silence on this question stands in marked contrast to its recent treatment of this "sufficiency" question in a diversity action emanating from the United States District Court for the Southern Division of Ohio, *Sypherd* v. *Haeckl's Express, Inc.*, 341 F.2d 65 (6th Cir. 1965), and its treatment of this issue in a Tennessee case decided prior to the instant case, *DeGarmo* v. *City of Alcoa*, 332 F.2d 403 (6th Cir. 1964). In *Sypherd* the Sixth Circuit specifically alluded to the fact that it was following the Ohio standard on this question. Likewise, in *DeGarmo* the court recognized the necessity for applying Tennessee law. However, one searches in vain the opinion of the Sixth Circuit in the instant case for even verbal recognition of the Tennessee law, let alone adherence to such law. Further, the court did not even articulate what Federal standard it was applying, if it was in fact applying a Federal standard. The court's opinion thus limps from the start.

The confusion inherent in the Court of Appeals' decision in the instant case is further compounded when one considers the Sixth Circuit's disposition of a "sufficiency" question in *Price* v. *Firestone Tire and Rubber Co.*, 321 F.2d 725 (6th Cir. 1963). In *Price* the court specifically recognized the problem reserved by this Court in *Dick* v. *New York Life Ins. Co.* and the significance of the question in light of *Erie R. Co.* v. *Tompkins*. Recognizing that under *Erie* the substantive law of Tennessee would control, the court in effect reserved the question, in deference to this Court's disposition of *Dick*, for the reason that it did not feel that there was any material difference in the Tennessee and Federal standard. Under the Sixth Circuit's dis-

position of the instant case, however, it is apparent that these standards cannot in fact be substantially the same since it is clear that petitioner's evidence meets the Tennessee standard. This fact is readily apparent upon examination of the evidence of record.

1. There was evidence Wood's previous experience had been that of a mere employee and crew chief in the maintenance of towers. (R. 204a; 259-60a). In fact, the name of Wood's company was the Central Illinois Tower *Maintenance* Company. (Emphasis added.) There was no *reliable* evidence in the record that Wood had ever erected towers on his own before.

2. There was evidence that Wood traveled to Pennsylvania about six months prior to his being hired for this job in order to solicit business from Stainless. (R. 196a). He told Stainless at that time that he had three winch trucks, a pickup truck, rope and cable and block, and monkey wrenches (R. 197a). Stainless told Wood that if he wanted any of their work he would have to do it cheaply, or as put by Stainless' representative, he would have to "keep his pencil sharp" in making his bids (R. 283a). Wood's bid was actually more than one-third lower than the other bid, and Stainless increased its original bid for fabrication by an amount almost equal to the bid of the other bidder. Stainless told Wood that they did not make any money on erection, that they were only interested in making money on the towers. (R. 238a).

3. The Deputy Project Manager at Oak Ridge for the H. K. Ferguson Company, one of the country's largest contractors, testified that in his twenty years in the construction business he had never seen a tower erected using the type of equipment utilized by Wood (R. 180a). A committee of the Atomic Energy Commission which investigated the accident ascribed as the first of five causes of

the accident the "use of a pickup truck as the source of power for the hoisting operations. (R. 179a). Wood testified "we were using a 1959 Ford pickup truck, three-quarter ton truck" to erect the towers; that the truck did not have an emergency brake (R. 216a); and, after the accident, he had to rent a winch truck in order to complete the erection of the tower. (R. 244).

4. Wood was engaged by long-distance telephone without benefit of having seen the plans or specifications for erection of the towers, and without any information as to the topography of the area where the tower was to be erected. (R. 219a). Wood testified himself that he knew only "vaguely" what the work entailed (R. 198a), and that Stainless only vaguely described the work to him. (R. 230a).

The question is, does the above-listed evidence, considered according to the standard of *Rose & Co.* v. *Snyder* laid out *supra,* p. 13, constitute sufficient evidence to go to the jury on the issue of whether Stainless knew, or by the exercise of reasonable care might have ascertained, that Wood did not have the proper equipment to erect these towers, and was thus an incompetent independent contractor? The Sixth Circuit says not; petitioner respectfully submits that in so saying it committed fundamental error, redressible only by this Court.

Short-hand formulations of the "sufficient evidence" rule by Federal courts are as numerous as the cases dealing with the question. The court must determine "not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it." *Improvement Co.* v. *Munson,* 14 Wall. 442, 448. "The requirement is for probative facts capable of supporting, with

reason, the conclusion expressed in the verdict." *Myers* v. *Reading Co.*, 331 U.S. 477, 485. Courts of appeals have frequently recognized this Court's admonishment to leave the resolution of issues of fact to the jury, not to try the case *de novo*, or sit as a "thirteenth juror," or substitute their judgment for that of the fact finder. See, *e.g.*, *Craig Funeral Home* v. *State Farm Mut. Auto Ins. Co.*, 280 F.2d 337 (5th Cir. 1960); *Land O'Lake Creameries, Inc.* v. *Hungerholt*, 319 F.2d 352 (8th Cir. 1963). Further, a certain deference is to be paid the opinion of the District judge, "who was intimately concerned with the trial [here both trials] and who has a first-hand knowledge of the applicable state principles, [and who] believed that the case should go to the jury." *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 447. This statement is especially true where, as here, the trial judge, Robert L. Taylor, was a man of long experience in jury trial cases, and a highly respected jurist.

While the general principles culled from both state and Federal pronouncements on the question are instructive as a touchstone for courts in considering this question, the decision ultimately must be made on the basis of the facts of each particular case. Petitioner has set out the evidence she believes to be sufficient to take this question to the jury. Giving petitioner the benefit of every reasonable, favorable inference to which she is entitled by law, manifestly there was sufficient, material evidence upon which the jury could and did find Stainless negligent. Certainly, on the basis of the record evidence cataloged, *supra*, pp. 15-16, the jury could reasonably have found that Wood, by virtue of his wholly inadequate equipment, his lack of experience in tower erecting, and his entire "marginal" existence as a tower erecter was incompetent to erect these towers. The jury could have further found that Stain-

less, in attempting to maximize its profits in this venture, had been negligent in hiring Wood in the manner it did and in failing to inquire more fully into whether Wood actually had the experience, and more importantly, the proper equipment, to erect these towers. Considered under any standard, this should have been sufficient evidence to take petitioner's case to the jury.

The Court of Appeals stated, wholly gratuitously since under its disposition of the case it did not have to reach the question, that under the Restatement of Torts, Section 411, comment *b*, Stainless would not be liable even if Wood was incompetent, because this was an isolated act of negligence and Stainless could not be expected to have knowledge prior to hiring Wood that at some future time he would, by lack of attention or diligence, move the truck forward instead of backward. While this may be generally true, it was wholly irrelevant to a determination of the issue before the court. It is entirely reasonable to infer from the jury's verdict and the evidence in the record that Wood's incompetence lay not in this isolated act of going forward instead of backward, but rather the use at all of a three-quarter ton pickup truck to erect a 150-foot tower where the truck could only be used effectively as a power implement by having the truck move farther and farther away from the site of the tower, down a steep hill approximately 300 feet away from the tower (R. 246a), using a power source which by its very nature required assemblage of an intricate pulley system utilizing numerous blocks and a pine tree in order to generate the requisite power and leverage. The jury could have determined (again, giving petitioner the benefit of every reasonable inference) that Stainless was negligent in failing to inquire into what power source Wood intended to use for this job,

especially in view of the fact that this particular job was not a normal tower erection since the top section had a 480-pound beam across it which made it entirely unlike the erection of a normal 150-foot steel tower. (R. 180a).

It is submitted that the conclusion is inescapable that the Sixth Circuit Court of Appeals simply disagreed with the result reached by the jury on this question and substituted its judgment for that of the jury by going back and reweighing the evidence (App. A at 6-7a), not in the light most favorable to petitioner, but rather in a grudging, illiberal manner. In so doing the Sixth Circuit committed fundamental error. "Even though [a Court of Appeals] may disagree with the result reached by the jury we have no right to substitute our judgment for theirs on this question of fact." *Dryfoos* v. *Scavenger Service Corp.*, 115 F.2d 637, 640 (7th Cir. 1940).

II

The trial judge submitted to the jury petitioner's alternative theory that Wood was an employee of Stainless and that Stainless was chargeable with Wood's negligence under the doctrine of *respondeat superior*. As noted, *supra*, the jury returned a general verdict in favor of petitioner. In its first opinion, the Court of Appeals did not question the jury determination that the employer-employee relationship existed. Rather, it hypothesized that if Wood was in fact an employee of Stainless, petitioner's recovery of workmen's compensation from Wood's Illinois carrier, even though made voluntarily by such carrier, would bar a common law damage suit against Stainless since the law and policy of Illinois and Tennessee were in accord that recovery of workmen's compensation was the

exclusive remedy under both acts and Tennessee would recognize the payments made pursuant to the Illinois law. (App. A. at 3-4a). Under this theory, Stainless would stand in the shoes of its employee Wood and be sheltered by the Illinois Act.

In so deciding, the Sixth Circuit wholly ignored settled Tennessee law holding that an employer who was required to comply with the Tennesse Act, but who had failed to do so, was amenable to either a common law damage suit or workmen's compensation recovery, and that the employee could elect to pursue either of these remedies. *Commercial Ins. Co.* v. *Young,* 290 Tenn. 608, 354 S.W.2d 779 (1962); *Schroader* v. *Rural Educ. Ass'n.,* 33 Tenn. App. 36, 228 S.W.2d 491 (1950); *Dawson Brothers and Beaver* v. *Petersen,* 11 Tenn. App. 167. Further, under the Tennessee Compensation Act, the employee's election to pursue a workmen's compensation remedy does not become irrevocable, so as to preclude him from prosecuting a common law action, until *after* a suit for compensation had been *filed and prosecuted to a final judgment.* T.C.A. §§50-1205, 50-1206; *Davis* v. *United States Fid. & Guar. Co.,* 206 Tenn. 683, 337 S.W.2d 240 (1960); *Hudgins* v. *Nashville Bridge Co.,* 172 Tenn. 580, 113 S.W.2d 738 (1938); *Shipley* v. *Wellwood Silk Throwing Mills,* 164 Tenn. 281, 47 S.W.2d 561 (1932). In this latter case, the Tennessee Supreme Court said, in construing § 50-1205 and § 50-1206 (formerly § 41 and § 42 of the Act):

> When the right of election exists, it is only the "institution of an action at law" that is to be deemed to be a waiver of the right to compensation. No reason is suggested for giving effect to an *extrajudicial* demand for compensation as a waiver of the right to sue at law, while denying similar effect to a similar demand for damages, and we

> do not think the Legislature intended to make such a distinction. (Emphasis added). *Id.* at 562.

The fact of the *voluntary* payments by Wood's Illinois carrier would therefore *not* be recognized in Tennessee, and the law and policy of Tennessee would not be in accord with the law of Illinois that workmen's compensation would be the exclusive remedy. According to the teaching of the cases of this Court, including *Carroll* v. *Lanza,* 349 U.S. 408; *Pacific Employers Ins. Co.* v. *Industrial Acc. Commission,* 306 U.S. 493; *Alaska Packers Ass'n* v. *Industrial Acc. Commission,* 294 U.S. 532; and this Court's recent pronouncement in *Crider* v. *Zurich Ins. Co.,* 85 S.Ct. 769 (1965), the Court of Appeals should apply Tennessee law which would allow this common law suit.

Having thus ignored the applicable Tennessee law and misapplied the "law and policy" of Tennessee and Illinois in its first opinion, the court was faced in its second opinion with the problem of extricating itself from the illogical corner into which it had written itself. At this point the court began counting employees of Wood and Stainless in order to determine if either had five employees working on this job, the statutory prerequisite to compliance with the Tennessee Workmen's Compensation Act. In searching the record to make the necessary count, the court determined that Wood had four men working for him in Tennessee, but refused to count Wood's wife in Illinois as an employee, even though she did all of his bookkeeping for him, since there was no showing that she was actually paid for her services. This point had not previously been an issue in the case and is properly a question for the jury, not for an appellate court. The court then considered whether Stainless had five em-

ployees in Tennessee, in order to determine if Stainless should have compiled with the act. To support this position, it was necessary for petitioner to establish that Wood and his men were employees of Stainless. The jury had previously determined, by virtue of the general verdict, that an employer-employee relationship in fact existed. The Court of Appeals, however, *reweighed* the evidence on this point and found that "these facts do not establish that the relationship of employer-employee existed between Stainless and Wood." (App. A. at 12a).

It is significant that the court did not hold that petitioner had failed to carry her "burden of proof" by failing to meet the "sufficient evidence" standard. In fact, the court again *substituted its opinion for that of the jury,* thereby depriving petitioner of her constitutional right to a jury trial, and in so doing, directly contravened the frequent admonitions of this Court and courts of appeals that such substitution is not within the province of an appellate court. (See cases cited *supra* at pp. 16-17.)

The question is not whether the Court of Appeals believed the employer-employee relationship was established—the jury had already determined this by way of general verdict. The question is whether there was "sufficient evidence" to go to the jury with the issue. In treating this question in its opinion denying rehearing, the Court of Appeals did not list all of the evidence (App. A. at 12a) upon which the jury could have based its determination. Nor did it make any reference to the Tennessee law governing submission of questions

to the jury, as enunciated in the Tennessee cases cited *supra* at p. 13. In addition to the evidence listed by the court, the jury could have based its determination upon the following record evidence:

> 1. Under Stainless' contract with Ferguson, Stainless was required to have a foreman or superintendent on the job; Ferguson's representative said that they looked to Wood as being such foreman (R. 165-75a); Wood had to be told what he would have to do because he had never seen the contract between Ferguson and Stainless (R. 239a); Wood was required, on the "advice" of Stainless, to hire a union man against his wishes (R. 234a); Wood's company was not allowed to complete the job but Stainless hired another company and completed the job through it, and Wood was in effect fired by Stainless. (R. 297-98a).
>
> 2. Stainless "Construction" Company was not in fact a construction company, but had to employ men such as Wood to erect the towers it sold (R. 276-78a; 300a); all correspondence between Wood and Stainless indicated that Stainless maintained a high degree of control over Wood (*e.g.*, R. 128-29a; 153a; 155a; 168-69a); Stainless did not require a performance bond of Wood (R. 231a); Stainless sent Wood a "construction order" covering the intended work (R. 151a; 163-64a); Wood had never installed automatic lighting and had to find out from Stainless how to do it. (R. 230a).

In his charge to the jury, the trial court correctly stated Tennesse law to the effect that an

> employer must show that he relinquished his right to control the employee, and that the latter did not

> have to take his orders and instructions from him. It is the right to control and not the extent to which that right is exercised that determines the relation. (R. 311-12a).

This charge was proper under *Rose & Co.* v. *Snyder,* 185 Tenn. 499, 206 S.W.2d 897 (1947). Further, the law of Tennessee is that the question of the relationship of employer-employee is ordinarily "one of fact." *Smart* v. *Embry,* 208 Tenn. 686, 348 S.W.2d 322 (1961). The question then becomes, could the jury have found, giving petitioner the benefit of every reasonable and fair inference to be drawn from the facts, that an employer-employee relationship existed between Wood and Stainless?[4] The trial court found this evidence sufficient to go to the jury; the Court of Appeals did not specifically find to the contrary, although the force and effect of its determination is such. The conclusion is inescapable that the Court of Appeals also usurped the jury's function on this issue and in so doing, deprived petitioner of her constitutionally-protected right to a jury trial. Clearly, on the basis of the evidence in the record the jury could have found

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[4] In this regard, it is interesting to note that Tennessee has in effect adopted the "nature of the work" test, described in 1 Larson, Workmen's Compensation Law, ¶45.10, in *Billings* v. *Dugger,* 362 S.W.2d 49 (1962). There a man who called himself a "builder" also subcontracted out almost all of his "building" work. The Tennessee Supreme Court held that an employee of a subcontractor could sue the "builder" for workmen's compensation benefits only, and could not sue him for damages as a third party, since defendant builder was in fact the employer of the plaintiff. One need only substitute the names of Stainless and Mooney for the parties in *Billings* to determine how the Tennessee Supreme Court would decide the question of the relationship of Stainless and Wood.

that Stainless retained the *right to control* Wood in his actions, or that the nature of Stainless' work was such that it would be treated as the employer of Wood. Placing the burden of proof on the issue of relinquishment of control on respondent, and giving petitioner the benefit of every fair and reasonable inference, it cannot fairly be said that this question of employer-employee relationship should not have gone to the jury.

In an apparent effort to circumvent the jury's finding and to support its own rationalization, the Court of Appeals stated that there was no "affirmative finding by the jury that Wood was an employee of Stainless." (App. A. at 13a). Then, by way of footnote, the court alluded to the fact that the jury, in reaching its general verdict, had returned to open court one hour prior to completing its deliberations and, when asked by the court if it had reached a verdict, announced that it had "reached a conclusion, a decision of the guilt of Stainless under number two charge [the negligence of Stainless in hiring an incompetent independent contractor] but have not been able to arrive at the amount of damages." (R. 338a). The court further stated that the general verdict "by no means establishes that the jury found Wood to be an employee of Stainless." (App. A. at 13a, n. 3).

Immediately after the statement by the foreman the trial judge stated:

> Well, you haven't reached a verdict. Now, gentlemen, the court does not ask you to give up any good faith opinion about the lawsuit, but the Court does request of you to exchange views, to exchange views on the matter in an effort to reach a verdict ... the Court will ask the jury to return for further deliberations and when you reach a verdict then

you may return and announce it in open court (R. 338-39a).

Counsel for respondent attempted to have the jury polled by asking each of the jury members upon which theory they had decided Stainless liable. The trial court refused this request. In its memorandum supporting its denial of the respondent's motion n.o.v. and in the alternative for a new trial, the trial judge characterized the issue as being the recurrent one of how far the trial court should go in protecting the privacy of the deliberations of the jury. The judge denied the motion because "courts do not favor public or private question of jurors as to the method used in reaching their verdict as such procedure could easily cause harassment and embarrassment." (R. 51a, citing cases.)

It is apparent that the Court of Appeals has by indirection made out precisely what the trial court would not allow respondent's counsel to do directly and has done so on the basis of pure conjecture as to what the jury actually determined. There is absolutely no showing that the jury returned its "verdict" upon either one or the other of the issues. The foreman's statement that they had reached a "conclusion, a decision" does not mean that they had reached a *verdict*. The court correctly instructed that they had not reached a *verdict* and returned them for further deliberation. Approximately one hour later they returned to the court room and in response to the judge's inquiry whether they had reached a "completed verdict" the foreman stated "we have." Upon being polled, each juror affirmatively indicated that the verdict announced was his verdict. It is well settled that there is in fact no verdict until a *completed verdict* has been reached:

"[T]he only verdict is that which the jury announces orally in court, and which alone is received and recorded as the jury's finding." *California Fruit Exchange* v. *Henry*, 89 F. Supp. 580 (W.D. Pa. 1950), *aff'd*, 184 F.2d 517 (3rd Cir. 1950).

The governing principle on the point was well stated in *Foster* v. *Moore-McCormack Lines, Inc.*, 131 F.2d 907 (2d Cir. 1942):

> Whether the jury carefully weighed the testimony in the light of the judge's instructions, of course, we do not know, and, indeed, are forbidden to inquire. There was a general verdict, and such a verdict 'throws its mantle of impenetrable darkness over the operations of the jury.' Appellant might have dissipated that darkness by asking, under Rule 49, . . . for a special verdict or for a general verdict accompanied by the jury's answers to interrogatories. *Id.* at 908.

In the instant case the respondent failed to make such request and thereby waived its right to such a procedure and should not now be heard to complain.

The ruling by the court below that there was no "affirmative finding by the jury that Wood was an employee of Stainless, the jury having returned a general verdict" (App. A. at 13a), is wholly unwarranted in view of the jury's subsequent deliberation after it first returned to open court, and substitutes conjecture and opinion of the Court of Appeals for the determination of the jury.

CONCLUSION

Wherefore, the petitioner prays that a writ of certiorari be granted.

Respectively submitted,

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